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Supreme Court of the United States

October Term, 1970
No. 816

SIMON G. ZERVOS,

Petitioner,

vs.

RICHARD M. MONEYMAKER,

Trustee-Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Simon G. Zervos (sometimes hereinafter called "Zervos"), respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on the 16th day of February, 1970.

Opinion Below.

The order of the District Court (Appendix A, *infra* p. 1) is not reported. The opinion of the Court of Appeals (Appendix B, *infra* p. 10) is not yet reported.

Jurisdiction.

The judgment of the Court of Appeals, Ninth Circuit, was entered on the 16th day of July, 1970. This petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under

28 U.S.C., Section 1254(1), and Section 24c of the Bankruptcy Act.

Questions Presented.

The issue here revolves around the denial of the discharge of Zervos and the questions presented are as follows:

1. Did Zervos commit perjury in connection with certain hearings held before the Referee in Bankruptcy?

2. If perjury was committed (which is not admitted), was the same as to a material matter?

Statutory Provisions Involved.

The Bankruptcy Act, Section 14c(1) (Appendix C, *infra* p. 12) provides, in brief, a bankrupt shall be granted a discharge unless the Court be satisfied the bankrupt has committed an offense punishable by imprisonment as provided under Title 18, United States Code, Section 152 (Appendix D, *infra* p. 13). This latter Section provides whoever knowingly and fraudulently makes a false oath or account in relation to any bankruptcy proceeding shall be fined not more than five thousand dollars ($5,000.00) or imprisoned not more than five years, or both.

Statement of the Case.

On April 7, 1967, Zervos filed a petition in bankruptcy. Subsequently, and to wit, on the 26th day of January, 1968, objections to his discharge were lodged by Richard M. Moneymaker (sometimes hereinafter referred to as "Trustee"), the duly appointed, qualified and acting trustee. The trustee in the objections al-

leged that Zervos committed an offense punishable by imprisonment under the said Title 18, U.S.C. Section 152, in that a false oath had been made during the course of a bankruptcy proceeding as follows:

> "That an examination conducted under the provisions of Section 21a of the Bankruptcy Act, on the 14th day of August, 1967, the bankrupt in response to questions as to whether or not he had given a certain Dun and Bradstreet report dated July 30th, 1962, replied he had not given such a report to any person, nor had he given Dun and Bradstreet any information to substantiate such a statement."

The objections go further and allege on the 25th day of September, 1967, at a hearing upon an objection to his discharge (which objection, incidentally, is not the subject matter of this proceeding, and in fact, that objection involved in the said 25th of September, 1967, was found not proved by the Referee) Zervos answered he had not furnished any information of a financial nature to Dun and Bradstreet, or any other financial gathering agency, saving and except he did recall he had received a telephone call from someone purporting to be from Dun and Bradstreet and had answered questions as to whether or not he was Simon Zervos, owned his home, and the like.

The trustee further alleged as a ground of objection that on the 18th day of October, 1967, (which was, incidentally, a continued hearing on the objections which had commenced on the 25th day of September, 1967) Zervos testified in response to questions he had not seen or given a Dun and Bradstreet report dated July 30th, 1962, to any person, firm or corporations.

It was the contention of the trustee that the aforementioned answers were false in that the bankrupt had signed Dun and Bradstreet reports and issued them to various persons and institutions.

At the hearing on the Objections to Discharge in this instant matter, Zervos testified he had not given the July 30th, 1962 Dun and Bradstreet report to any person. An officer of the Bank of America, one Richard C. Kieffer, did testify there was on file with the Bank a Dun and Bradstreet report dated the 30th day of July, 1962, but that the same had been obtained from Dun and Bradstreet and not from Zervos. One Janice Schoen testified she had been given a report of Dun and Bradstreet by Zervos; however, the report given to her was dated the 5th day of October, 1961. Likewise, on Doris L. Drake testified she had received a Dun and Bradstreet report dated the 5th day of October, 1961.

Reason for Granting the Writ.

The element of dischargability in a bankruptcy proceeding is of substantial and nationwide importance to all persons contemplating the benefits of the Bankruptcy Act.

While it is true Zervos in his testimony stated he had not given a Dun and Bradstreet report to any person, it did develop from testimony of two witnesses, as set forth above, he had given a report dated the 5th day of October 1961, to such witnesses. It should be pointed out in all fairness that the witness from Dun and Bradstreet did testify he had taken certain information from Zervos which *may* have been the basis for the 30th of July, 1962 report, and the 5th of October, 1961 report. (Italics supplied).

Collier on Bankruptcy, 14th Edition, Vol. 1, Section 1421, and commencing at page 1335, states:

> "A bankrupt may be denied a discharge in bankruptcy by virtue of the first objection, if he 'knowingly and fraudulently makes a false oath or accounting or in relation to any bankruptcy proceeding.'"
>
> "The analogy to this objection to a crime usually compels strict pleading and proof, but under the majority rule only a fair preponderance of evidence is necessary to sustain the charge . . ."
>
> "The false oath must have related to a material matter. Testimony as to property which can have no bearing upon the estate's condition, is not material in a proceeding under this Act. Matters so trivial in nature as to have but little effect upon the estate and upon creditors, have been treated as immaterial."

From the objections which were filed by the trustee, it is rather obvious, and in his objections he alludes to certain testimony specifically which was given on the dates set forth hereinabove, the trustee refers to a financial statement dated the 30th day of July, 1962, and it is respectfully believed that the bankrupt was testifying in relation to such a statement, and there was nothing shown that the bankrupt had given that statement to any persons, nor was there any testimony whatsoever produced that he had signed the said statements.

However, the more important problem, it is respectfully submitted, is the materiality of the statements. In the original Findings of Fact the Referee in Bank-

ruptcy found that the bankrupt had given the financial statement in question, and that by reason thereof his testimony when he denied giving the said statement was false and fraudulent, and that the bankrupt was attempting to conceal relevant and material information from the trustee and his creditors. The District Court stated Zervos false statement and his alleged involvement in their compilation was certainly material to the bankruptcy proceeding. And the District Court went further, and stated there was a substantial possibility that the reports were detrimental in that Zervos admitted they were at least in part incorrect. The Appellate Court likewise found the same to be material.

Petitioner is aware that in general, and as was pointed out by the District Court, false statements as to financial statements may constitute a material misrepresentation.

Nevertheless, the statements made by the bankrupt, if in truth and fact they were false, were completely immaterial to the proceedings. As noted above, the petition in bankruptcy was filed on the 7th day of April, 1967; that on the 14th day of August, 1967, approximately four months later, it was known to the trustee that certain Dun and Bradstreet reports were alleged to have been given, for it was on that latter date, at a 21a Examination that there were questions raised concerning the Dun and Bradstreet report of July 30th, 1962. However, no proof was made by the trustee that the statements made by the bankrupt were in any manner material. The trustee did not show there was any property which was being concealed. the trustee did not show that there had been any hearing con-

ducted in relation to the said statement, and the trustee did not show that there was any property which was being concealed from this estate, nor did he show that there was any property which could have been taken back by the estate at any time during the proceeding. It certainly should appear that at least some showing of materiality must be made. It is further pointed out the financial statements in questions were given five and six years prior to the filing of the instant proceedings in bankruptcy.

At the hearings on the objections as well as the review and appeal, the only statement as to materiality made by the Court is that it *might* have been material had the trustee known of these statements in question. (Italics supplied)

Conclusion.

For the foregoing reasons it is respectfully submitted this petition for Writ of Certiorari be granted.

Dated: October 7, 1970.

Respectfully submitted,

SLATE AND LEONI,
By ANDREW F. LEONI,
Attorneys for Petitioner.

APPENDIX "A."

Order Affirming Referee's Findings of Fact and Conclusions of Law and Order.

In the United States District Court, Central District of California.

In the Matter of Simon G. Zervos, Bankrupt. In Bankruptcy No. 12545-F.

Filed Oct. 30, 1968.

The bankrupt in this proceeding, Simon G. Zervos, seeks review of the Referee's Order, dated April 1, 1968, denying discharge after a hearing.

These proceedings were commenced upon the filing of a voluntary petition in bankruptcy. On January 26, 1968, the trustee filed Specifications of Objections to Discharge, and served copies thereof on the bankrupt and his attorney. Hearings thereon commenced February 29, 1968. The Referee's Order and Findings of Fact and Conclusions of Law were filed April 1, 1968, by which the discharge of Simon Zervos was denied. The Referee based his decision upon provisions of section 14(c) of the Bankruptcy Act (11 U.S.C. §32(c)):

> "The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under section 152 of Title 18; . . ."

Specifically, the Referee found that the bankrupt had "knowingly and fraudulently made a false oath in relation to his Bankruptcy proceedings", in violation of 18 U.S.C. §152.

The bankrupt now raises essentially two objections to the Referee's Order. First, that the charges made in the Specifications of Objections were not established by the evidence, and, second, that even if they were established, the alleged false testimony upon which they are based did not relate to a material matter and therefore cannot support a denial of discharge.

I.

The Specifications of Objections is the objecting party's pleading in a proceeding on an application for discharge, and thus restricts the issues to be presented. In the case at bar, the Specifications set forth the allegedly false testimony, verbatim, upon which the objections were based.

Essentially, the Specifications here consist of three portions of Zervos' testimony at prior hearings in the bankruptcy proceedings. In the first portion, Zervos was asked whether a statement in a particular Dun & Bradstreet report on his own financial condition was correct. He answered:

> "At no time had I seen a Dun & Bradstreet report nor had I given to Dun & Bradstreet any information whatsoever to substantiate the statement. . . . I never did see a report. I never seek credit from anyone."

In the same series of answers, Zervos denies ever having given the report to anyone, or having ever seen it.

The second portion is primarily concerned with whether Zervos was ever interviewed by a representative of Dun & Bradstreet. He testified that he received one or two telephone inquiries from that organization, the contents of which he could not recall. He also stated

that he never exhibited to anyone a copy of a Dun & Bradstreet report on himself dated July 30, 1962, nor did he ever see it or take it with him.

In the third portion, Zervos denied ever having seen a copy of the July 30, 1962, Dun & Bradstreet report on himself.

Much of the bankrupt's argument before this court stems from the poorly drafted final sentence of the Specifications which reads as follows:

> "That all of the aforementioned Answers were false and knowingly false, in that the bankrupt signed said Dun & Bradstreet reports and issued them to various persons and institutions."

Basically, the bankrupt argues that in order to support the objections the proof must establish that the answers were in fact false *only* in those respects noted in the final sentence; that is, that such testimony was false because Zervos "signed" and "issued" certain Dun & Bradstreet reports. In effect, Zervos' position is that the fact that such answers might be false in any other respect would not be sufficient to sustain the objections.

None of the allegations concerned a signing of any of the reports, nor was there any testimony during the hearings relating to such a signing. Thus, the issue is whether or not a finding of falsity of this testimony must be limited in that respect. This court holds that it does not.

The Specifications in this proceeding function as the pleadings on the application for discharge. They must set forth allegations unequivocally and with particularity. See generally, 1 Collier, Bankruptcy Par. 14.11[1]. They must provide the bankrupt with due

notice of the charges against him so that he may adequately prepare his defense.

Here, it may not be claimed that the proof went beyond the issues raised by the Specifications. The false testimony upon which denial was based was fully set forth. None of it related to signing Dun & Bradstreet reports. Certainly, in light of the specificity with which the charges were alleged, the bankrupt cannot now complain that the only falsity alleged was in the *signing* of reports. A literal reading of the final sentence restricting the issues to a fact entirely absent from the detailed factual allegations would be unreasonable in this case. The fact that the final sentence of the Specifications appeared to limit the issues to signing and issuing the reports cannot override the plain and clear import of the Specifications read as a whole. At most, this was a defect in form. The bankrupt forewent his right and opportunity to answer the Specifications and object to such defects. His failure to utilize the proper procedure constitutes waiver of formal defects.

> "Objections to the form of the specifications are waived unless made before the trial, and if they are not taken in the lower court, they cannot be raised on review. *Even an exception upon the ground of a failure to aver an element which is essential to the ground of objections may be waived;* . . ." 1 Collier, *supra*, ¶14.08[2] at 1300 (emphasis added).

The reference to "signing" in the final sentence did not deprive the bankrupt of notice of the true nature of the charges being made. The answers which the Referee found to be falsely given were flat denials; the answers themselves gave full notice of the nature of

the falsity alleged. Further, even if one considers the final sentence, it is inherent in the charge that Zervos "signed" and "issued" reports, that he necessarily saw and exhibited them.

Finally, at no time during the pertinent hearing testimony did the bankrupt object on this ground.

> "At the hearing on the application for discharge the issues are restricted to those set forth in the specifications of grounds of objection to the discharge, *unless these are amended or enlarged by proof at the trial.*"

1 Collier, *supra*, ¶14.11 at 1307 (emphasis added). Thus, even if it could be maintained that the Specifications were originally limited by the final sentence, they may be here treated as amended to conform to the proof. See *In re Feinsilver*, 24 F.2d 408 (2d Cir. 1928).

II.

The bankrupt also contends that the Specifications were limited to a particular Dun & Bradstreet report, dated July 30, 1962. However, it was alleged that he made a flat denial of ever having seen *any* such report, and also of having personal interviews with an agent of Dun & Bradstreet. These answers could not be considered as so limited, and, if fraudulently and falsely given, are alone sufficient to support the denial.

The problem of which report is in issue is most evident in the charge that Zervos exhibited copies of reports to third parties. All of the testimony alleged in the specifications concerning such exhibition does in fact relate to the July 30, 1962, report, and no others. Nevertheless, during the hearing, Zervos testified, *with-*

out objection, that he never exhibited *any* Dun & Bradstreet report to a third party.

"Q. Did you also testify previously that you had never shown or exhibited a copy of a Dun & Bradstreet report on your personal financial condition to any third party?

A. That is correct.

* * *

Q. Is that your testimony today?

A. Yes."

[Feb. 29 Hearing, Tr. p. 14, lines 5-8, 11-12.]

The testimony of two witnesses is relevant to the allegations of exhibition: that of Doris Blake and Janis Schoen. The Blake testimony related only to a report dated October 5th, 1960, and not to the July 30 report.

The Schoen testimony is confusing. At the February 29 hearing she stated that what she received from Zervos was the July 30 report; when confronted with it she stated, "I believe it is the same one" (Tr. Feb. 29, p. 44, line 22). She was then asked:

"Q. Well, have you looked at both sides of it, to be sure?

A. Yes. But I was looking for one thing in particular."

Then at the later hearing when she was requested to bring in the copy of the report she claimed to have retained, it turned out to be a report dated October 5, 1961. The following testimony was then elicited:

"THE REFEREE: This one is dated October the 5th, 1961.

Mrs. Schoen, I think we showed you a previous one dated July 30, 1962.

THE WITNESS: Yes.

THE REFEREE: And you indicated yours was like that.

THE WITNESS: I had a copy of that one, also.

THE REFEREE: What happened to that?

THE WITNESS: I possibly still have it. ***But this is the one Mr. Zervos gave to me. . . .***"

[March 5 Tr. p. 6 (emphasis added).]

Therefore, the evidence clearly shows that Zervos gave her a copy of a Dun & Bradstreet report other than the July 30th one. Although she stated she had a copy of the July 30 report, she does not say how she got it.

Thus, there is no testimony that Zervos ever exhibited a copy of the July 3; report to anyone. However, because Zervos denied showing a copy of *any* Dun & Bradstreet report to anyone, and did not object to the contrary evidence, the Specifications, even if given the narrowest construction, may be treated as amended to conform to proof.

III.

The burden of proof in this proceeding is twofold. The objecting party must first show reasonable grounds for believing that the bankrupt engaged in the improper conduct alleged. Here this burden was fulfilled by the evidence of exhibition of reports (which also establishes Zervos saw the documents), and of his personal interviews with a representative of Dun & Bradstreet in contradiction to his testimony (March 5 Tr. pp. 21-23).

Once the objecting party makes such a showing, the burden of proof (burden of persuasion) shifts to the bankrupt to establish that he did not commit the acts alleged. *Keeble v. Sulmeyer,* 290 F.2d 127, 130 (9th Cir. 1961); 1 Collier, *supra,* ¶14.12.

The bankrupt has not sustained his burden of rebutting the trustee's prima facie case.

IV.

The false oath must have related to a material matter. Zervos contends it did not since it was not shown that the Dun & Bradstreet reports involved were false. However, Zervos is not charged with being responsible for false statements made to Dun & Bradstreet; he is charged with falsely stating that (1) he never gave any information personally to Dun & Bradstreet, (2) he never saw any Dun & Bradstreet reports, and (3) he never gave any Dun & Bradstreet reports to anyone.

The Dun & Bradstreet reports showed that Zervos was worth millions of dollars. The evidence shows that he used these reports in conducting business (*i.e.,* in getting credit). His false statements with respect to these reports and his alleged involvement in their compilation is certainly material to bankruptcy proceedings, particularly since the bankruptcy act imposes upon the bankrupt a duty to submit to examination "concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons. . . ." Section 7 (11 U.S.C. §25(a)(10)). A similar provision is found in section 21 (11 U.S.C. §44). See *In re Slocum,* 22 F.2d 282 (2d Cir. 1927).

It does not matter that the items which were the subject of the false statement might not have been detrimental to creditors. *In re Slocum, supra.* Here there is a substantial possibility that they were detrimental, since the bankrupt admitted that they were at least in part incorrect (although it was not shown in what respects) (Feb. 28 Tr. p. 16).

Thus, Collier states:

> "A bankrupt who at the first meeting of creditors swears positively that he never made a statement of his financial condition to anyone, when in fact he had made such a statement a very short time before, is guilty of knowingly and fraudulently making a false oath." 1 Collier, *supra,* ¶14.29 at 1348.

See also, *Fidelity and Deposit Co. of Md. v. Browder,* 291 F.2d 34 (5th Cir. 1961).

The order of the Referee is therefore affirmed.
October 30, 1968.

ILLEGIBLE
United States District Judge

APPENDIX "B."

Opinion of the Court of Appeals.

United States Court of Appeals, for the Ninth Circuit.

In the Matter of Simon G. Zervos, fdba, Simon G. Zervos Enterprises, Bankrupt.

Simon G. Zervos, formerly doing business as Simon G. Zervos Enterprises, Petitioner and Appellant vs. Richard M. Moneymaker, Trustee, Respondent and Appellee. No. 24,012.

[July 16, 1970]

Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS, CARTER and KILKENNY, Circuit Judges.

PER CURIAM:

Appellant filed a voluntary petition in bankruptcy. During the proceedings he was questioned concerning his knowledge of and involvement in certain financial reports prepared by Dun & Bradstreet. The trustee (appellee) filed objections to appellant's discharge on the ground that appellant had committed perjury in violation of 18 U.S.C. §152 and was thus barred from discharge because of the provisions of 11 U.S.C. § 32. Although he had the right to do so, appellant did not file a response to appellee's specifications of perjured testimony. The bankruptcy referee refused to discharge appellant because he found that appellant had committed perjury in his testimony concerning the financial reports. The district judge reviewed and upheld the referee's decision.

Appellant's main point is that falsity of his testimony was not proved because the specifications referred to a July 30, 1962, report, while the witnesses at the discharge hearing referred to reports bearing a different date. Thus, he argues, he was not answering falsely when he claimed lack of knowledge of the July 30, 1962, report. Such a technically narrow construction of his answers is of no avail to appellant because his testimony and the specifications were not limited to a particular report but broadly covered his denial that he had seen or distributed a Dun & Bradstreet report or had given Dun & Bradstreet any information whatsoever to substantiate the statements in the reports. If appellee erred in his specification concerning the date of a report (apparently there were several reports and the testimony concerning dates was conflicting), the error did not deprive appellant of notice of the charges and was waived by his failure to respond to the specifications. We agree with the district judge's conclusion that the answers went to a material matter.

Affirmed.

APPENDIX "C."

Section Fourteen (11 U.S.C. § 32)

§14. Discharges, When Granted. a. The adjudication of any person, except a corporation, shall operate as an application for a discharge: *Provided,* That the bankrupt may, before the hearing on such application, waive by writing, filed with the court, his right to a discharge. A corporation may, within six months after its adjudication, file an application for a discharge in the court in which the proceedings are pending.

. . . .

c. *The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under title 18, United States Code, section 152.*

APPENDIX "D."

2. Crimes and Offenses (Title 18, United States Code).

a. *Concealment of Assets; False Oaths and Claims; Improper Conduct.*

Title 18, U.S.C., Chap. 9, §§ 152-154

§152. Concealment of Assets; False Oaths and Claims; Bribery. Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of

a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly or fraudulently transfers or conceals any of his property or the property of such other person or corporation; or

Whoever, after filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.